Office of the Clerk
Supreme Court
231 East State Capitol
P.O. Box 1688
Madison, Wisconsin 53701-1688
Telephone 608-266-1880

TO: December 23, 1992

Hon. Russell W. Stamper
Milwaukee County Cir. Ct.
10201 W. Watertown Plank Rd.,
Rm. 16F
Wauwatosa, WI 53226

William A. Jennaro
Cook & Franke S.C.
660 East Mason St.
Milwaukee, WI 53202-3877

Donald C. Fellows
Steven T. Caya
Fellows, Piper & Schmidt
733 N. Van Buren, Fifth Fl.
Milwaukee, WI 53202

Gerald R. Turner
Julie J. Flessas
Gerald R. Turner & Assoc.
229 E. Wisconsin, Ste. 300
Milwaukee, WI 53202

You are hereby notified that the Court has entered the following order:

No. 91-0444 *Brown v. Farhoud* L.C. #707560

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Juanita S. Brown, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Shirley S. Abrahamson, J. (dissenting). I would grant the petition for review because I believe the court should address (1) the standard a judge should apply in deciding whether to recuse himself or herself from a case; (2) the standard and appellate court should apply in reviewing a judgment in a case in which the judge created an appearance of partiality; and (3) whether the due process right to a fair trial requires the court to use an objective standard for disqualification of a judge.

These issues have been the subject of several recent petitions for review or petitions for supervisory writs.[1] In those petitions, and in the petition presently before the court, counsel have asserted that it is difficult to identify a consistent standard in decisions of this Court. I agree. *Compare Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. American TV & Appliance*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989) (Abrahamson and Bablitch, J.J., not participating); *State v. Walberg*, 109 Wis. 2d 96,

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[1] *See State v. Tellier*, Case Nos. 90-2207 and 90-2208-CR, order filed February 11, 1992 (denial of a petition for review relating to recusal) (Abrahamson, J., dissenting); *State v. Rochelt*, Case No. 89-CF-1003, order filed February 11, 1992 (denial of a petition for review relating to recusal) (Abrahamson, J., dissenting); *State v. Becholt*, Case No. 90-1306 and 91-0500-W, order filed June 3, 1991 (denial of a petition for review and supervisory writ relating to recusal) (Abrahamson, J., dissenting); *State ex rel. National Union Fire Insurance Co. v. Circuit Court for St. Croix County*, Case No. 90-0935-W, order filed May 29, 1990 (denial of a petition for a supervisory writ relating to recusal) (Abrahamson, J., dissenting). *See also Disciplinary Proceedings against Crosetto*, 160 Wis. 2d 581, 602-03, 466 N.W.2d 879 (1991) (Abrahamson, J., dissenting).

325 N.W.2d 687 (1982) (habeas corpus granted, 766 F.2d 1071 (7th Cir. 1985)); *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977); *State v. Rochelt*, 165 Wis. 2d 373, 377-82, 477 N.W.2d 659 (Ct. App. 1991); *State v. Carviou*, 154 Wis. 2d 641, 454 N.W.2d 562 (Ct. App. 1990); *Matter of Mason*, 916 F.2d 384 (7th Cir. 1990).

For these reasons I believe the court should grant the petition for review.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 6, 1992

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-0444

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

JUANITA S. BROWN,

Plaintiff-Appellant,

SENTRY INSURANCE COMPANY,

Plaintiff,

v.

INSHIRAH FARHOUD, and
GERMANTOWN MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

ON motion to vacate court of appeals opinion filed February 2, 1992.

Motion to vacate denied.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Juanita Brown moves the court to vacate its decision in *Brown v. Farhoud*, No. 910444 (Wis. Ct. App. Feb. 4, 1992). She contends that Judge Fine, one of the three judges who participated in the decision, was disqualified as a matter of law and that the decision is void. We conclude that Judge Fine was not disqualified as a matter of law and deny her motion.

We first address the issue of our jurisdiction to consider Brown's claim. The general rule is that we have no jurisdiction to vacate or modify a judgment after the record is remitted to the trial court. *See State v. American TV & Appliance*, 151 Wis. 2d 175, 178, 443 N.W.2d 662, 663 (1989); *Ott v. Boring*, 131 Wis. 472, 491-92, 111 N.W. 833, 835 (1907). The record was remitted in *Brown* on March 1, 1992. Brown did not bring the motion to vacate the decision until July 17, 1992, after the record had been remitted.

Despite the postremittitur rule, however, we retain jurisdiction to modify or vacate our decision where a judge is disqualified by law from participating in a case. *American TV*, 151 Wis. 2d at 180-81, 443 N.W.2d at 664. This is because "[a] judgment or order which is void may be expunged by a court at any time," and the "right to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments." *Id.* at 181, 443 N.W.2d at 664, quoting *State ex rel. Wall v. Sovinski*, 234 Wis. 336, 342, 291 N.W. 344, 346 (1940). Thus, in the interest of justice and to avoid even the appearance of impropriety, we exercise our jurisdiction to consider Brown's claim.

We next consider whether Judge Fine was disqualified as a matter of law from participating in *Brown*. Disqualification, if appropriate here, would have fallen under the

sec. 757.19(2)(g), Stats., which provides that "[a]ny judge shall disqualify himself or herself from any civil or criminal action or proceeding when . . . [the] judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

> As explained by the supreme court in *American TV*:
>
> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner.
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> * * *
>
> . . . [B]ecause the basis for disqualification is subjective, requiring the judge's determination of an actual or apparent inability to act impartially, there is no standard to apply on review other than an objective one limited to establishing whether the judge made a determination requiring disqualification. *American TV*, 151 Wis. 2d at 183, 186, 443 N.W.2d at 665, 666.

Based on *American TV*, this court has held that "once a . . . judge determines that there is no partiality or appearance of partiality under sec. 757.19(2)(g), his [or her] decision on that matter is reviewable only to establish whether the . . . judge . . . made a determination requiring recusal and failed to heed his [or her] own finding." *State v. Carivou*, 154 Wis. 2d 641, 646, 454 N.W.2d 562, 564 (Ct. App. 1990).

As indicated in Judge Fine's non-participating opinion, Judge Fine has informed this court that he determined that he could act fairly and impartially prior to taking part in *Brown*. Since Judge Fine made that determination before participating in the case, we conclude that under sec. 757.19(2)(g), Stas., Judge Fine was not disqualified.

In sum, then, although we are concerned about Brown's delay in raising the issue, we do accept the responsibility—always, absent some extraordinary circumstance—to review a claim that a judge was disqualified as a matter of law from participating in a decision, and we will consider this claim even after the case has been remitted to the trial court. We stress, however, as did the supreme court in *American TV*, 151 Wis. 2d at 192, 443 N.W.2d at 669, that an attack on the validity of a judgment of this court on the ground of a member's disqualification by law for an apparent inability to act impartially is a serious matter and should not be undertaken lightly.

By the Court.—Motion denied.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

Fine, J. (*non-participating*). As related by the *per curiam* decision, Juanita S. Brown seeks vacatur of this court's decision in *Brown v. Farhoud*, No. 91-0444, (Wis. Ct. App. Feb. 4, 1992). She contends that section 757.19(2)(g), Stats., required my recusal from the panel. Although I have determined that my participation in the decision on Brown's motion would be inappropriate, I believe that the parties and the court should understand why I did not disqualify myself from *Brown*. *Cf. State v. American TV & Appliance of Madison*, 151 Wis. 2d 175, 183, 443 N.W.2d 662, 665 (1989) (Supreme Court justice's post-decision letter to parties recounted his pre-decision determination that he was not disqualified under section 757.19(2)(g), Stats.) (denying motion to vacate decision).

As Brown points out in her submissions in support of her motion to vacate, I made it a practice while a circuit judge to disqualify myself from cases in which a party was represented by the attorney who represented Brown

before the trial court and on the appeal in this matter. That practice stemmed from my apprehensions concerning the lawyer's candor with the court as the result of a 1981 incident, which the lawyer later recounted in a letter to me of August 21, 1986:

> You have accused me of misleading you in the past. As I have already explained this is not true. I told you that I was supposed to be in another court on the date in question to finalize my participation in a jury trial before reporting to your court to start another jury trial. Between the time that I had instructed my secretary to call you and the time that she did call you the next day, I had already completed my role in the jury trial in the other court with no further word to my secretary. Therefore, when she called you she did not know that another lawyer from our office was in the other court and that I would be going directly to your court. I was delayed in arriving to your court for another reason and when you inquired in regard to my whereabouts, I merely said my secretary called, remembering she was to call for the other reason. You have now indicated that you will recuse yourself in any cases in which my office is involved. This disappoints me to say the least, because I have always enjoyed working with you and have the highest respect for your manner. Through the years we have had our differences, but only I trust in the interests of doing our best. I am sorry that our relationship has ended on a sour note and hope in time you will realize that your concern has been misplaced.

Upon receipt of the briefs in *Brown*, I noticed that Brown was represented by the lawyer, and I recalled my practice as a circuit judge to recuse myself from his trial-court cases. Nevertheless, I decided not to recuse myself from the appeal.

Trial judges must be able to accept representations by counsel at face value. Proceedings at the appellate level are, in contrast, completely circumscribed by the record. *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 571, 307 N.W.2d 881, 895 (1981). A brief's representations must be supported by record references, Rule 809.19(1)(d), Stats., which will either support or belie those representations. Similarly, representations as to the law must also be supported by citation to legal authority. Rule 809.19(1)(e), Stats. Here, too, the cited legal authority will either support or belie the representations. Under these circumstances, I determined that my doubts concerning the lawyer's candor could not, and would not, affect my ability to decide the case fairly and impartially. Apparently, the lawyer agreed since he neither inquired as to whether I would be sitting on the panel—even though he had, at least on one occasion, made a similar inquiry when I was on the circuit court—nor sought my disqualification. Based on the foregoing, I concluded that I could fairly and impartially decide the issues raised in the *Brown* appeal, and that my impartiality could not be reasonably questioned.

DISTRICT I

Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, March 16, 1993

To:

Stuart B. Eiche
Stuart B. Eiche, S.C.
700 N. Water Street
Milwaukee, WI 53202-4206

Gerald R. Turner
Gerald R. Turner & Assoc., S.C.
229 E. Wisconsin Ave., Ste. 300
Milwaukee, WI 53202

You are hereby notified that the court entered the following order:

92-2369 Lukowski v. Dankert et al.

Before Fine, J.

By motion dated December 22, 1992, and received by the Clerk of the Court of Appeals on December 28, 1992, Kathy Lukowski, the appellant on this appeal, sought the following relief: "that the Honorable Ralph Adam Fine recuse himself from participating in this appeal for the reasons set forth in the affidavit which is attached hereto." Attached to Lukowski's motion is a document signed by her attorney on this appeal, Gerald R. Turner, Esq. Although the document purports to be an affidavit, it was not signed under oath. The motion and document are attached to this order as Exhibit One.

By letter dated January 20, 1993, the Clerk of the Court of Appeals notified Mr. Turner that the motion would be considered if and when I was assigned the appeal in this matter:

> I am sure you are aware that the court to which this appeal is assigned, District I, is comprised of four judges and cases are assigned randomly to three-judge panels. Because the briefing has not yet been completed, this appeal has not been assigned to a three-judge panel for disposition. Your motion is premature because it is quite possible that Judge Fine will not be assigned to the panel disposing of this appeal. The court will decide the motion on its merits once a three-judge panel is assigned.

This appeal has now been assigned to a three-judge panel in District I, and I am on the panel. Thus, Lukowski's motion is ripe for decision.

The question of whether I should recuse myself from an appeal in which Mr. Turner represents one of the parties has been raised before—by Mr. Turner in a post-decision motion to vacate. *See Brown v. Farhoud*, No. 91-0444 (Wis. Ct. App. October 6, 1992) (denying motion to vacate) (no pre-decision motion to recuse was brought in *Brown*). A copy of the court's October 6 order in *Brown* and my non-participating opinion is attached to this order as Exhibit Two. For the reasons expressed in the non-participating opinion in *Brown*, Lukowski's motion is denied.

Therefore,

IT IS ORDERED that the motion to have me recuse myself is denied.

Marilyn L. Graves
Clerk of Court of Appeals